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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 249

HAROLD C. FULLER, *Petitioner,*

v.

STATE OF ALASKA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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OPINIONS BELOW

The opinion of the Supreme Court of Alaska is reported at 437 P.2d 772. The Superior Court of Alaska, Fourth Judicial District, wrote no opinion.

JURISDICTION

This Court has jurisdiction under 28 U.S. § 1257(3). This Petition is not timely filed within the period prescribed by Rule 22(1) of this Court. For reasons stated at pp. 6-7, *infra*, we submit that this defect is not jurisdictional and urge that the requirements of the rule be waived in this case.

QUESTION PRESENTED

May evidence obtained in violation of 47 U.S.C. § 605 be admitted in evidence in a criminal trial in a state court?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves Article VI, cl. 2, of the United States Constitution (the Supremacy Clause) and § 605 of the Federal Communications Act, 48 Stat. 1064, 1103, 47 U.S.C. § 605. They are reprinted in Appendix B, *infra*.

STATEMENT OF THE CASE

Petitioner, Harold C. Fuller, was convicted of "shooting with intent to kill or wound" and sentenced to 10 years in prison by the Superior Court of Alaska, Fourth Judicial District.

It was the theory of the prosecution – and the court below held that there was sufficient evidence for the jury to convict on that theory (App. pp. A-7–A-9)–that petitioner's co-defendant Lester James Brown, also known as Toni Dutra, had shot one Myron Gutman in September 1965, and that petitioner had hired Brown to perform this act.

The pertinent facts can be briefly summarized. Petitioner and his wife, Juanita, became acquainted with Gutman and his wife became particularly friendly with him, whereupon Petitioner divorced her. (Tr. 114, 151, 283). In November 1963, petitioner came to Gutman's house when his wife was there, fought with Gutman, and threatened that he would see Gutman dead within six months. (Tr. 152-153). After the divorce, petitioner moved from Fairbanks but Juanita remained and cared for their children.

In August of 1965 "Toni Dutra" came to Fairbanks (Tr. 165). "Dutra" carried a gun in a shoulder hol-

ster (Tr. 168) and reported that he was in Fairbanks "to shoot a man." (Tr. 723). He never contacted Juanita Fuller but he showed considerable interest in Myron Gutman. He called at Gutman's place of business (Tr. 258) and scouted his home. (Tr. 189-190). On August 26, 1965, "Dutra" contacted Gutman on the pretext of purchasing an automobile from him. (Tr. 261). During the demonstration ride "Dutra" drew a pistol and shot Gutman twice just below the heart. (Tr. 198). There was no apparent motive and no prior threat or warning of the shooting. (Tr. 267).

While in Fairbanks, "Dutra" had received a cryptic telegram whose admissibility is the issue raised by this Petition. The telegram was addressed to "Toni Durta" at the Nordale Hotel at Fairbanks, Alaska, and read as follows:

> HI SON. I GOT A CALL FROM NEW YORK AND I MUST BE ON THE EAST COAST MONDAY MORNING FOR AN IMPORTANT MEETING. THIS SHOULD NOT CHANGE YOUR PLANS FOR A NICE VACATION. WHEN YOU RETURN TO TOWN STAY AT TOWN CENTRE MOTEL, FIRST AND LINCOLN. ASK DESK CLERK FOR LETTER FROM YOUR FRIEND LESTER BROWN CONTAINING CAR CLAIM CHECK AND A SMALL BIRTHDAY GIFT. I WILL BE LEAVING SUNDAY BUT WILL CALL YOU AT THIS MOTEL EVERY DAY STARTING MONDAY. I WILL PLACE CALLS AT 7 AM AND 7 PM UNTIL YOU ARRIVE. IF YOU ARE NOT BACK BY WEDNESDAY I WILL CALL NORDALE AS PRE ARRANGED. I FEEL RATHER GOOD THAT MY COMPANY FEELS I AM THIS IMPORTANT. BE CAREFUL AND DO NOT BE CONCERNED ABOUT THIS CHANGE IN PLANS. ACKNOWLEDGE RECEIPT OF THIS COMMUNICATION VIA WIRE.

It was signed "Bill Durta," Room 807, Ridpath Hotel, Spokane, Washington.

This telegram was a major link by which the prosecution tied petitioner to his co-defendant[1] and to the crime.[2] Its theory was that the telegram instructed "Dutra" how to collect the money for the shooting, that "Dutra" followed those instructions, and that petitioner was the person who sent the telegram. Petitioner's former wife identified the

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[1] In October 1965, Petitioner wrote Juanita a letter in which he stated that he had made the mistake of hiring Brown to look into the welfare of the children.

[2] In his summation to the jury the prosecuting attorney argued as follows:

> " The crime with which we are involved here was a vicious crime. Myron Gutman, I submit, was shot and shot not accidentally, but with the intent of the assailant that he be wounded or that he be killed. That is the nature of the case which you have to weigh here today. Do not deal lightly, do not deal heavily with the telegram which was placed in evidence. Read it, read it with consideration to all the facts in this case, Is it so frivolous? Are we to expect that if the wire fulfilled the function which we believe that it fulfilled, that it would have contained other than innocuous language? Is the suggestion that if the wire means anything it must have said, "Lester Brown, go out and kill * * * Mike Gutman. Signed Harold Fuller." Is that what we should expect? Or should we expect something to be not quite so abrupt, not quite so direct? Can't we expect that the true intent and the true purpose and the true communication might be somewhat glossed over to the point that without viewing the situation with respect to other facts in evidence, without viewing it in respect to the fact that Lester Brown on the 27th checked in to the Towne Centre Motel in Spokane, received the item which the telegram refers to, opened it and it had the contents that the telegram refers to. Is this a mere coincidence? I submit that it is not a mere coincidence. That the telegram indicates a connection between these two persons prior to August 26th, 1965." (Tr. 997-998).

signature on the registration card as that of petitioner.

At the trial, two copies of the telegram were introduced (Ex. P & Q). Petitioner made timely objection to its admissibility, *inter alia* on the ground that it had been obtained in violation of federal law.[3] On appeal, the Supreme Court of Alaska affirmed his conviction. It held that the telegram was admissible even if it had been obtained in violation of § 605 of the Federal Communications Act:

> "Although this statute makes no reference to admissibility of evidence, it has been construed to render inadmissible in a court of the United States communications intercepted and sought to be divulged in violation thereof . . . . But this does not mean that the statute makes such communications inadmissible in a state court. In *Schwartz* v. *Texas* the United States Supreme Court held that section 605 of the Federal Communications Act applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since the federal statute has no effect on state court proceedings, appellant's contention that the telegram was inadmissible because of the statute has no merit, and it is therefore unnecessary for us to decide whether the telegram was in fact obtained in violation of the federal statute. Other state courts have reached similar results." (App. A, pp. A-3–A-4, footnotes omitted.)

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[3] It was also objected to unsuccessfully that there was insufficient proof of petitioner's authorship of the telegram. See App., pp. A-5–A-7, where this contention is rejected by the court below.

Mr. Justice Rabinowitz filed a concurring opinion. (App. p. A-10). He stated that petitioner had failed to carry the burden of proving a violation of § 605 of the Communications Act. Accordingly, he found it "unnecessary to decide whether as a matter of policy, our courts should countenance a violation of section 605 in any court proceeding." (*Id.*)

THE PETITION SHOULD BE ENTERTAINED ON THE MERITS ALTHOUGH NOT TIMELY FILED

The opinion of the Supreme Court of Alaska was entered on March 1, 1968. Its mandate (Appendix B, *infra*) was issued to the Superior Court on March 12, 1968. On whichever date as the time for filing the petition for certiorari began to run, this petition is out of time under Rule 22(1) of this Court. However, we submit that the Rule is not jurisdictional and urge that the Rule be waived in this case and that this Petition be entertained on the merits.

In *Heflin* v. *United States*, 358 U.S. 415, 418, n. 7, it was held that a petition for certiorari to a United States Court of Appeals in a criminal case may be entertained even if it is filed after the passage of the thirty days prescribed in Rule 22(2). The Court determined that "no jurisdictional statute is involved" and accordingly, that the requirement of the rule could be waived. The reasoning of the *Heflin* case governs the jurisdictional question here. Congress likewise did not fix the time for filing a petition for certiorari in the state court in a criminal case, but authorized this Court to fix the time by rule 28 U.S.C. § 2101(d).[4]

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4 On the other hand, the time to file a petition for certiorari in civil cases has been established by Congress in 28 U.S.C. § 2101(c) and is therefore jurisdictional. See Wallace v. Virginia, 392 U.S. - - -, 36 U. S.L.Wk. 3484 (June 17, 1968).

In *Heflin* "the majority agree[d]to dispense with the requirements of our rule in order to avoid wasteful circuity" 358 U.S. at 419, n. 7. The Court reasoned that if certiorari were denied Heflin would have been able to raise the same question by a renewed application for post-conviction relief. The constitutional question presented by petitioner can also be presented in an application for post-conviction relief, in the federal courts, even if no petition for certiorari were filed. *Fay* v. *Noia*, 372 U.S. 391. Accordingly, this is one of the rare occasions on which waiver of the Rule would not frustrate its purpose but would rather promote the objective of speedy disposition of litigation. Nor would respondent State be prejudiced by waiver even it be assumed that a State has a legitimate interest in retaining a conviction which was obtained in violation of federal law as authoritatively declared by this Court. Because post-conviction remedies are available to petitioner, the State, unlike a prevailing party in civil litigation, would not obtain a final determination even if certiorari were denied.

REASONS FOR GRANTING THE WRIT

The Judgment of the Court Below Is Based On a Precedent Which Has Now Been Overruled by This Court

Petitioner argued in the court below that the "Durta" telegram should not have been admitted into evidence against him because it had been obtained in violation of § 605 of the Federal Communications Act. The Supreme Court of Alaska rejected this contention on the sole ground that "the federal statute has no effect on state court proceedings" (App. A, pp. A-3–A-4, *infra*), basing that conclusion on *Schwartz v. Texas*, 344 U.S. 199 (1952). However, on June 17, 1968, this Court expressly overruled *Schwartz* and squarely held that § 605 does prohibit the divulgence in a state court of communications obtained in violation of § 605. *Lee* v. *Florida*, 392 U.S. - - -, 36 U.S.L.Wk. 4652. The judgment of

the court below thus rests on an interpretation of a federal statute which has since been disapproved by this Court, and should therefore be reversed.

In the court below, the state contended in the alternative that the telegrams had not been illegally obtained. The concurring Justice expressed the view that the burden of proving a violation was on the defendant, and that defendant had failed to meet this burden, without, however, explaining the basis of his conclusion. This circumstance does not militate against reversal of this case on the authority of *Lee*. Consistent with its view that the legality of the evidence was irrelevant to admissibility, the majority below neither expressed its own view on the burden of proof nor discussed the pertinent record evidence. This Court's normal procedure when it adopts new doctrine is to leave to the lower courts the determination whether it is applicable to pending cases. For example, after *Bruton* v. *United States*, 391 U.S. - - -, decided May 20, 1968, this Court granted certiorari in a series of cases and remanded them for reconsideration in light of *Bruton*, although it was not clear on the face of the papers that the petitioners were entitled to the benefits of the new rule.[5] The same course should be followed here.

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[5]For example, in Nelson v. United States, 392 U.S. - - -, 36 U.S.L. Wk. 3472, the co-defendants' confession did not refer to petitioner by name. Accordingly, the United States argued in its Brief in Opposition that petitioner had no standing to object to its admission. Brief for the United States in Opposition, p. 7, No. 78, Misc., Oct. Term, 1967. Nevertheless, the Petition was granted with directions to the lower court to reconsider the case in light of Bruton.

CONCLUSION

By reason of the foregoing, this petition for a writ of certiorari should be granted, and the cause remanded to the Supreme Court of Alaska for further consideration, in light of *Lee* v. *Florida, supra.*

Respectfully submitted,

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